COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SATUITE WOODS REALTY TRUST

v.

SCITUATE BOARD OF APPEALS

No. 02-03

RULINGS ON MOTIONS TO INTERVENE
AND JOINT MOTION FOR ENTRY OF ORDER
GRANTING COMPREHENSIVE PERMIT

July 11, 2003

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I. PROCEDURAL HISTORY

In December 2000, the Satuite Woods Realty Trust submitted an application to the Scituate Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable housing on a 21-acre site at 90 Stockbridge Road in Scituate. The proposal was for 96 two-bedroom condominium units for residents aged 55 and older to be financed under the Federal Home Loan Bank of Boston's New England Fund. After extensive public hearings, the Board unanimously denied the permit, and on February 11, 2002, the developer appealed to the Housing Appeals Committee.

On February 26, the Committee opened its hearing on the appeal with a conference of counsel, and the parties discussed plans for beginning the evidentiary portion of the hearing during the summer. On July 11, 2002, Richard and Kathleen Pocock, neighbors residing at

88 Stockbridge Road, moved to intervene pursuant to the Committee's regulations, 760 CMR 30.04(2).[1] As is the Committee's usual practice, a ruling on that motion was deferred, but rather the Pococks were granted permission to participate fully in the proceedings, through counsel, as *amici curiae*. Tr. I, 18; II, 27.

On September 12, 2002, the Committee was prepared to conduct its first evidentiary session. At that hearing session, however, the Board and the *amici* requested that the matter be remanded in order to consider the design of septic systems as an alternative to a connection to the public sewer—one of the primary issues of contention. Tr. I, 23, 35. I granted that request. Tr. I, 45, 60-64. Despite the decision to remand the matter, a limited amount of testimony about existing conditions was heard from the developer's site engineer in order to inform a site visit, which was taken immediately after the close of the hearing session. Tr. I, 69, 72-73, 83-91. (Though a Pre-Hearing Order is commonly issued at the time of the first evidentiary hearing session, that was not done, nor was documentary evidence admitted. Tr. I, 70.)

The Board reopened the public hearing in Scituate on October 9, 2002, and held a further session on November 14, 2002. On December 18, the Board voted unanimously to grant a comprehensive permit, subject to numerous conditions, for a compromise design of 69 units of housing. That decision was memorialized in writing and filed with the Scituate Town Clerk on February 10, 2003. See Exh. 9.

In anticipation of formalizing the compromise, the parties requested that a further

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1. The Pococks have also filed two lawsuits with regard to these proceedings, naming the Committee and others as defendants. See *Pocock v. Scituate Board of Appeals, et al.*, Plymouth Super Ct. No. PL-CV 2003-00059 (filed Jan. 13 2003); *Pocock v. Scituate Board of Appeals, et al.*, Plymouth Super. Ct. PL-CV 2003-0261B (filed Feb. 28, 2003).

hearing session before this Committee be scheduled. It was held February 12, 2003, though no evidence was received; rather the parties reported on the compromise and requested that the Committee approve a stipulation of judgment. See Tr. II, 5-6, 12-13. At that session, the Pococks and other Scituate residents filed an additional motion to intervene pursuant to G.L. c. 30A, § 10A, alleging damage to the environment as that term is defined in G.L. c. 214, § 7A. They did not explicitly oppose the request by the parties to approve the compromise, though that appears to have been their intent. See Tr. II, 16-18; also see letter from counsel, Jonathan D. Witten, Esq. filed Apr. 1, 2003.

On March 19, 2003, the developer and the Board filed a joint motion requesting that the Committee issue a decision and order granting a comprehensive permit in accordance with the February 10 decision of the Board, and the abutters renewed their request to be heard on their motions to intervene. To give the parties and proposed interveners full opportunity not only to present their positions, but also such documentary evidence and testimony as they deemed necessary, a further hearing session was held on June 4, 2003. Testimony was heard from two expert witnesses, the developer's site engineer and the abutters' hydrologist.

II. FACTUAL BACKGROUND

The site consists of 21 acres, including a relatively small amount of wetlands.[2] Tr. I, 86. It is located between Stockbridge Road to the south and, to the north, an unused railroad right of way now owned by the Town of Scituate, which is likely to be reactivated as the

2. Most of the wetlands are located on what will become restricted "conservation lots." These lots total about four and three quarters acres; the wetlands themselves are about half this area. Exh. 8, Tr. III, 20, 22-24.

Greenbush rail line. Exh. 8; Tr. I, 85. The current, 69-unit proposal includes 48 condominium units for people over 55 years of age and 21 single-family homes. The condominiums are in a single building in the northern corner adjacent to the railroad right of way, and homes are on a roadway that generally runs east to west through the center of the site. Exh. 8; Tr. III, 14. Near the condominium building, that is, to the north and east of the site, without frontage on Stockbridge Road, is a housing development owned by the Scituate Housing Authority. Exh. 8; Tr. I, 85. Wetlands are preserved on the southern portion of the site and at the far western part of the site. Exh. 8. There is about 300 feet of frontage on southern boundary along Stockbridge Road. Exh. 8. At the front of the site, abutting it to the east is a single-family house lot at 90 Stockbridge Road. Exh. 8; Tr. 85. The Pocock property, at 88 Stockbridge Road, is to the east of this parcel. It does not appear that the Pocock property technically abuts the site. Exh. 8. However, two access roads from Stockbridge Road are proposed, and one of these will be via an easement through 90 Stockbridge Road, to the west of an existing driveway, but within about 30 feet of the Pocock property. Exh. 8; Tr. III, 18, 21. This proposed roadway will run parallel to the Pocock property for about 200 feet. Exh. 8.

The proposed development will have septic systems in compliance with state Title 5 requirements and a stormwater drainage system is currently fully designed to comply with the state's stormwater management policy. Tr. III, 27-31, 35-38; Exh. 8.

III. DISCUSSION

I will first address the motions to intervene. The Pococks' expert witness testified that the proposed roadway will be within the state Wetland Protection Act's 100-foot buffer zone of wetlands on the Pocock property. Tr. III, 100; also see Exh. 8. (In this location, the road will not be within 50-foot "no-disturb" zone of the local wetlands bylaw. See Tr. III, 92.) He testified that the road will have an effect on the Pocock property due to the lessening of the beneficial effects of the buffer.[3] Tr. III, 100, 108. He also testified that there would be generalized damage to the environment throughout the site. Tr. III, 109. His testimony was based largely on general principles and his professional experience, rather than personal study of the site. Tr. III, 111-112.

With regard to the motion to intervene under our regulations, 760 CMR 30.04, the evidence makes it quite clear that any impact from stormwater drainage on the Pocock property will be minimal. As with all of the proposed roadways, the access roadway nearest them has berms and catchbasins. Exh. 8 (sheet 3); Exh. 9, p. 6 (Conditions 24, 25); Tr. III. Before construction, there will be further review by the Scittuate Conservation Commission under the state Wetlands Protection Act, and similarly, all state Title 5 requirements must be met. See Tr. III, 116-117. In addition, the Board clearly addressed the issue of stormwater in its decision, which included 60 conditions. "Final design of storm water management system shall comply with Department of Environmental Protection Storm Water Management Policy and shall be reviewed and approved as complying with said Storm Water Management Policy by the Board's consulting engineer at Applicant's expense." Exh. 9, p. 4 (Condition 11). It

3. He also mentioned the increase in wastewater, though this appears to be a secondary concern since the nearest septic leaching field is 300 feet away, on the opposite side of the wetlands. See Tr. III, 108; Exh. 8.

also specifically required that the peak rate of stormwater runoff not increase for the 2-, 10-, 25-, and 100-year storm events, that erosion and sedimentation controls be implemented, that as-built plans be submitted and certified, and that an operation and maintenance plan for the system be submitted for approval. Exh. 9, p. 9 (Conditions 52-55). Our regulations specify that intervention shall not be permitted when there is "no showing… that one or more of the parties will not diligently represent [the interveners'] interests. 760 CMR 31.04(2). I find that the decision of the Board adequately addressed the Pococks' interests and that no significant damage will be done to their property.

The second motion to intervene is pursuant to G.L. c. 30A, § 10A, which permits ten people to intervene in an adjudicatory proceeding in which damage to the environment, as defined in G.L. c. 214, § 7A, might be at issue. I am not convinced that an appeal before the Housing Appeals Committee—where intervention rights are already established by 760 CMR 30.04—is the sort of proceeding for which nearly automatic intervention contemplated by G.L. c. 30A, § 10A is appropriate.[4] In any case, the purpose of such intervention is "in order that any decision… shall include the disposition of [the] issue [of damage to the environment and the elimination or reduction thereof]." G.L. c. 30A, § 10A. That purpose has been

4. There appear to be no reported precedents interpreting G.L. c. 30A, § 10A that can be of assistance. It is fair to assume, however, that the policy considerations underlying the similar provisions of G.L. c. 214, § 7A are instructive. Initially, the Supreme Judicial Court interpreted that statute broadly. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 646, 308 N.E.2d 488, 494 (1974). But the Court's more recent interpretation of the law has been increasingly narrow. See *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984); *Cummings v. Secretary of the Executive office of Environmental Affairs*, 402 Mass. 611; 524 N.E.2d 836 (1988); *Town of Wellfleet v. Glaze*, 403 Mass. 79, 525 N.E.2d 1298 (1988); *Town of Walpole v. Secretary of the Executive Office of Environmental Affairs*, 405 Mass. 67, 537 N.E.2d 1244 (1989); also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 48 Mass.App.Ct. 239, 247 n.13, 719 N.E.2d 874, 880 n.13 (1999), aff'd 432 Mass. 132, 731 N.E.2d 525; also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 432 Mass. 132, 141-142, 731 N.E.2d 525, 532-533 (2000). I believe that my ruling is consistent with these precedents.

accomplished here since the Board's decision has provisions for protection of the environment, and convincing evidence to the contrary was not presented during the Committee's hearing by the proposed interveners. This is particularly true in light of the statutory provision that "damage to the environment shall not include any insignificant... impairment...." G.L. c. 214A, § 7A, para. 1. Based upon my consideration of the law and the facts before me, I deny the motion to intervene.

Finally, I address the motion for entry of order granting the comprehensive permit. As noted above, the Board's decision is lengthy and thorough. In addition, it was issued after remand and full public hearing. Under these circumstances, rather than the more common situation in which the parties simply settle their differences during the course of an ongoing appeal before us, a full review of the terms of the compromise by this Committee may not even be necessary.[5] A simple request that we approve the withdrawal of the appeal might be sufficient. Nevertheless, I have reviewed the Board's February 10, 2003 decision (Exhibit 9) carefully, and considered it in light of the testimony, the development plans, and other documentary evidence presented. I find all of these to be consistent and satisfactory, and I therefore approve the Board's grant of a comprehensive permit.[6]

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5. The Pococks and others have no interest in our ruling with regard to the parties joint motion since we have denied their motions to intervene, and in any case, they participated in the local hearing, and their rights are already protected by their pending suit in Superior Court. See Tr. II, 18-19.

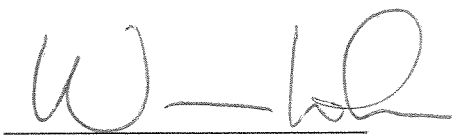
6. The proposed interveners also filed a request for a proposed decision pursuant to 760 CMR 30.09(5)(h) and G.L. c. 30A, § 1(7). Such a proposed decision is not required since this ruling is being issued by the Presiding Officer rather than the full Committee. (The Presiding Officer has "all those powers conferred upon the Committee..., except that he or she shall not be empowered to make any decisions which would finally determine the proceedings except as to matters of jurisdiction, enforcement..., or where such a determination results from agreement or stipulation between the parties." 760 CMR 30.09(5)(b). Approval of settlement—particularly here, where a full

IV. CONCLUSION AND ORDER

The motions to intervene are denied. The Parties joint motion for entry of order granting a comprehensive permit pursuant to the February 10, 2003 decision of the Scituate Board of Appeals is granted.

The Board is directed to take any further steps necessary to formalize the comprehensive permit for recording or other purposes. No construction shall commence until detailed construction plans and specifications have been approved pursuant to 760 CMR 31.09.

Housing Appeals Committee



Date: July 11, 2003

Werner Lohe, Chairman
Presiding Officer

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hearing was conducted and a decision issued by the Board—is certainly within those powers. Also see G.L. c. 30A, § 10(2).)